Hassett Maintenance Corporation *and* Local Union No. 200, Service Employees International Union, AFL-CIO. Case 3-CA-9582

March 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 13, 1981, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union,[3] and by discontinuing its contributions to the Union's health insurance and pension plans and instituting its own Blue Cross/Blue Shield plan on or about February 22, 1980. We disagree, however, with the Administrative Law Judge's finding that Respondent also violated Section 8(a)(5) and (1) by discontinuing its compliance with the dues-checkoff provision in the 1976 collective-bargaining agreement,[4] and by discontinuing the deduction of union dues after January 31, 1980. The Administrative Law Judge found that, although the contract expired on January 31, 1980, Respondent thereafter violated the Act by discontinuing the checkoff of dues without giving prior notice to the Union or affording it a chance to bargain over this change. However, it is well established that a union's right to the checkoff of dues is extinguished at the expiration of the collective-bargaining agreement creating that right. *Bethlehem Steel Company (Shipbuilding Division)*, 136 NLRB 1500 (1962), affd. in relevant part 320 F.2d 615 (3d Cir. 1963). We therefore find, contrary to the Administrative Law Judge, that Respondent had no obligation to continue dues checkoff after the termination of the collective-bargaining agreement on January 31, 1980.

AMENDED REMEDY

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by discontinuing its contribution to the Service Employees Welfare and Insurance Fund (hereinafter the Fund)[5] provided for in the

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We note that the 1976 collective-bargaining agreement is a 4-year agreement, rather than a 3-year agreement, as mistakenly stated by the Administrative Law Judge.

In finding Respondent's poll of its employees to be a violation of Sec. 8(a)(1), we also rely upon the fact that Respondent did not have a good-faith doubt, based on objective considerations, of the Union's continuing majority status at the time the poll was conducted. We further find that Respondent's poll violated Sec. 8(a)(5). *Mid-Continent Refrigerated Service Company*, 228 NLRB 917 (1977); *Jackson Sportswear Corporation*, 211 NLRB 891 (1974); and *Montgomery Ward & Co., Incorporated*, 210 NLRB 717 (1974).

In finding that Respondent's poll was unlawful, we find it unnecessary to rely upon the Administrative Law Judge's suggestion that it might have been a more reasonable course of action for Respondent to file an RM petition.

[3] The Administrative Law Judge found that, while the Union's request for modification of the 1976 collective-bargaining agreement was untimely under art. 18 of that agreement, Respondent had waived the 60-day notice requirement contained therein. (Art. 18 provides that the agreement shall automatically continue from year to year after its expiration date "if neither party serves written notice to the other party sixty (60) days prior to the day of expiration of this agreement.") The General Counsel excepts to this finding, arguing that the agreement was automatically renewed because the Union's request for modification was untimely. We agree with the Administrative Law Judge. At no time did Respondent ever take the position that the Union's request for modification was untimely, nor did it ever refuse to bargain on that basis. See *General Maintenance Service Company, Inc.*, 182 NLRB 819 (1970), enfd. 442 F.2d 1147 (4th Cir. 1971). Likewise, the Union continued its attempt to contact Respondent for negotiations after its untimely request for modification. Thus, both parties acted as though the request for modification was effective, and as though the contract had not been renewed. We therefore adopt the Administrative Law Judge's finding that there was a waiver.

[4] Art. 5 of that agreement provides:

> Check off
>
> Section 1—As a condition of employment and upon receipt of the proper authority from the individual Union employee, the Employer agrees to deduct on the first pay day of each month from the pay of each Union employee, all Union initiation fees, dues, fines and assessments for the current month and remit the same to the Local Union on or before the fifteenth day of the month in which it is due.

[5] The terms for the Fund are set forth in art. 11 of the 1976 collective-bargaining agreement. In relevant part, the Fund provides:

> Commencing February 1, 1976, and for the duration of this Agreement, the Employer agrees to pay to the Service Employees Welfare and Insurance Fund (hereinafter referred to as the Fund), for each active employee covered by this Agreement who has been in the continuous active service of the Employer for a period of four (4) months, the sum of twenty-three cents ($.23) per hour for each hour such an employee is paid wages, including sick leave, vacation, holiday, death leave and jury duty.
>
> These payments are for the purpose of purchasing for each such employee life insurance in the face amount of three thousand ($3,000.00) dollars, accidental death benefits, group medical and hospitalization insurance at least equivalent to the Blue Cross/Blue Shield 46/47 Plan, group dental care insurance at least equivalent to

Continued

1976 collective-bargaining agreement.[6] To remedy this violation, the Administrative Law Judge recommended, *inter alia*, that Respondent be ordered to pay, at no cost to the employees in the bargaining unit, the contributions to the Fund that it discontinued after January 31, 1980, and to discontinue the Blue Cross/Blue Shield plan which it instituted at that time. However, to require Respondent to pay double insurance premiums by making all contributions for medical benefits for the entire period since January 31, 1980, would impose an undue burden on Respondent. Additionally, such payments would constitute a windfall to the Fund, since Blue Cross/Blue Shield has presumably already paid a substantial portion of the benefits to which employees would be entitled during this period. Thus, we shall not order Respondent to make retroactive payments to the Fund for medical benefits, but shall order Respondent to make the employees in the bargaining unit whole, with interest, for the loss of medical benefits to the extent that costs which would have been paid by the Fund were not actually paid by the Blue Cross/Blue Shield plan instituted by Respondent.[7] Since all employees employed in the bargaining unit after January 31, 1980, will be entitled to such lost medical benefits, we shall require that Respondent take appropriate action to notify, in writing, all employees and former employees that are so qualified of their entitlement to these benefits.[8]

In order to allow the Union an opportunity to consider whether to request the reinstatement of the Fund, while not leaving the matter open indefinitely, the Union shall be required to request reinstatement within 20 days of the date of our Order herein, and if the Union does not request such reinstatement then the medical insurance plan presently in effect shall remain in effect. Once all unit employees employed by Respondent on the effective date of the reinstatement of coverage under the Fund are covered by that plan, Respondent may discontinue the payment of premiums on their behalf to the insurer providing coverage under the parties' collective-bargaining agreement.[9]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Hassett Maintenance Corporation, Buffalo, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Local Union No. 200, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All building service employees employed by the Employer within the jurisdiction of this Local, but excluding professional employees, guards, and supervisors as defined by the Labor Management Relations Act, as amended.

(b) Polling its employees as to their union sympathies or desires.

(c) Telling its employees that it is not going to have a contract with the Union.

(d) Telling its employees that it is not going to make any more contributions to the Union for health and life insurance as provided for in article 11 of the 1976 collective-bargaining agreement.

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that presently in effect, major medical insurance to be determined by the Trustees of the Fund.

The Administrative Law Judge referred to this plan by a number of different names ("health plan," "health insurance plan," "health benefit provision," "health benefit program," and "health and life insurance plan"). Each of these descriptions refers to the same plan. We adopt his finding, and note that it is unaffected by the following amended remedy section. We further note in this regard that, while the Administrative Law Judge referred to the health insurance and pension provisions of the collective-bargaining agreement as one plan, they are in fact separate plans. We shall modify the Order to reflect this fact.

[6] The Administrative Law Judge also recommended that Respondent make contributions to the Union's pension plan provided for in the collective-bargaining agreement. We adopt his finding, and note that it is unaffected by the following amended remedy section. We further note in this regard that, while the Administrative Law Judge referred to the health insurance and pension provisions of the collective-bargaining agreement as one plan, they are in fact separate plans. We shall modify the Order to reflect this fact.

[7] In measuring actual damages, employees should be reimbursed for actual costs to the extent that those costs would have been paid by the Fund minus costs which were actually paid by Respondent's insurer. See *Turnbull Enterprises, Inc.*, 259 NLRB 934 (1982).

With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[8] As set forth above, the medical benefits provided under art. 11 of the 1976 collective-bargaining agreement include group medical and hospitalization insurance, group dental care insurance, and major medical insurance. Art. 11 also provides for certain nonmedical benefits; i.e., life insurance and accidental death benefits. These nonmedical benefits are not affected by our foregoing amended remedy. Consequently, we adopt the Administrative Law Judge's recommendation that Respondent make the contributions to the Fund that it discontinued after January 31, 1980, but only with regard to that portion of Respondent's contributions which were to be used by the Fund for the purchase of nonmedical coverage. We leave to the compliance stage the determination of what percentage of Respondent's contributions was apportioned by the Fund to provide such coverage.

[9] Under the 1976 collective-bargaining agreement, an employee must have been "in the continuous active service of the Employer for a period of four (4) months" in order to be eligible for Fund benefits. Should any employees have been hired shortly prior to the date Fund coverage becomes effective pursuant to this remedy, such individuals might not qualify for Fund benefits for up to 4 months later. Therefore, to avoid the possibility of individuals hired after January 31, 1980, being left with no medical insurance coverage during this interim period, we shall require Respondent to continue to make premium payments on such individuals' behalf until such time as each qualifies for coverage under the Fund plan.

(e) Telling its employees that they should sign into its health plan so that there would be no lapse in coverage.

(f) Instituting a Blue Cross/Blue Shield plan without notifying the Union or giving it an opportunity to bargain about such plan.

(g) Discontinuing contributions to the health insurance and pension plans provided for in the aforementioned collective-bargaining agreement.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole the employees in the bargaining unit for the loss of health insurance benefits under the 1976 collective-bargaining agreement in the manner set forth in the section of this Decision entitled "Amended Remedy."

(c) Upon written request from the Union, and in the manner set forth in the section of this Decision entitled "Amended Remedy," rescind the insurance plan which it instituted after January 31, 1980, and immediately reestablish the Service Employees Welfare and Insurance Fund under the 1976 collective-bargaining agreement.

(d) Notify, in writing, all persons employed in the bargaining unit after January 31, 1980, of their entitlement to damages for the loss of health insurance benefits.

(e) Pay to the pension plan contributions that it discontinued after January 31, 1980, at no cost to the employees in the bargaining unit.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the sums of money due under the terms of this Order.

(g) Post at its Buffalo, New York, place of business copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and bargain collectively with Local Union No. 200, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All building service employees employed by the Employer within the jurisdiction of this Local, but excluding professional employees, guards, and supervisors as defined by the Labor Management Relations Act, as amended.

WE WILL NOT poll our employees as to their union sympathies or desires.

WE WILL NOT tell our employees that we are not going to have a contract with the Union.

WE WILL NOT tell our employees that we are not going to make any more contributions to the Union for health and life insurance as provided for in article 11 of the 1976 collective-bargaining agreement.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT tell our employees that they should sign into our health plan so there will be no lapse in coverage.

WE WILL NOT institute a Blue Cross/Blue Shield plan without notifying the Union or giving it an opportunity to bargain about such plan.

WE WILL NOT discontinue our contributions to the health insurance and pension plans provided for in the aforementioned collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive bargaining representative of our employees in the appropriate unit concerning wages, hours, and other such terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make the employees in the bargaining unit whole, with interest for the loss of health insurance benefits under the 1976 collective-bargaining agreement.

WE WILL, upon written request from the Union, rescind the insurance plan which we instituted after January 31, 1980, and immediately reestablish the Service Employees Welfare and Insurance Fund under the 1976 collective-bargaining agreement.

WE WILL notify, in writing, all persons employed in the bargaining unit after January 31, 1980, of their entitlement to damages for the loss of health insurance benefits.

WE WILL pay to the pension plan contributions that we discontinued after January 31, 1980, at no cost to the employees in the bargaining unit.

HASSETT MAINTENANCE CORPORATION

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), was heard by me in Buffalo, New York, on August 25, 1980. The complaint alleges that Hassett Maintenance Corporation (herein called Respondent) violated Section 8(a)(5) and (1) of the Act, by polling its employees as to their union sympathies, making unilateral changes in working conditions, and refusing to bargain with Local Union No. 200, Service Employees International Union, AFL-CIO (herein called the Union), as the representative of Respondent's employees.

The charge was filed by the Union on February 11, 1980. The complaint based on that charge was issued by the General Counsel of the National Labor Relations Board on behalf of the Board by the Regional Director for Region 3 on March 20, 1980.

Upon the entire record, including my observations of the witnesses and their demeanor and consideration of the briefs filed on behalf of the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a wholly owned subsidiary of W. D. Hassett, Inc., a New York corporation with its principal office and place of business in Buffalo, New York, is engaged in the management and operation of office buildings and related services. During the past 12 months, Respondent, in the course and conduct of its business operations, received revenue for office rental exceeding the sum of $100,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Local Union No. 200, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent and the Union entered into 3-year bargaining agreements effective January 2, 1973, and February 1, 1976, which contained provisions concerning wages, hours, and other terms and conditions of employment. The latter agreement was effective from February 1, 1976, through January 31, 1980. It contained a clause which renewed the contract from year to year subsequent to January 31, 1980, unless Respondent or the Union served written notice to the other party 60 days prior to the day of expiration of the agreement.

Respondent recognizes the Union as the exclusive collective-bargaining agent for the following unit:

> All building service employees employed by the Employer within the jurisdiction of this local [the Union], but excluding professional employees, guards, and supervisors as defined by the Labor Management Relations Act, as amended.

During the material times in this case, the unit consisted of two employees, Percy Miller and John Mooney. At one time the unit contained three people but in 1979 the unit size was reduced to two.

On December 3, 1979, the 60th day prior to the expiration of the collective-bargaining agreement, the Union sent a letter to Respondent, requesting modification of certain articles in the agreements which was to expire

January 31, 1980. The letter also requested that "mutually agreeable dates" be set up for negotiation of the modifications. The letter was misaddressed to Robert Zugger, the manager of the Statler Hotel who was not part of Respondent. The letter did however contain the correct name and address of Respondent but was not sent by registered mail. Respondent contends that it did not receive the letter until December 17, 1979.

Article XVIII of the agreement provides as follows:

ARTICLE XVIII

TERM OF AGREEMENT

> This agreement shall be in full force and effect as of February 1, 1976, and up to and including January 31, 1980. Thereafter if neither party serves written notice to the other party sixty (60) days prior to the day of expiration of this agreement, it shall automatically continue from year to year. Whenever notice is given for changes, the nature of the changes desired must be specified in the notice.

As previously indicated, the Union sent a letter to Respondent. It reads:

> December 3, 1979
>
> Mr. Robert Zugger
> Hassett Maintenance
> Statler Hotel
> 107 Delaware Avenue
> Buffalo, New York 14202
>
> Dear Mr. Zugger:
>
> Please be advised that Local 200, Service Employees' International Union, AFL-CIO, respectfully submits this written notice requesting modification of certain articles in our existing agreement which expires on January 31, 1980.
>
> We are requesting that mutual agreeable dates be set up.

As may be seen from the above the Union's notice was not timely in that it was neither mailed nor served on Respondent 60 days *prior* to the day of expiration of the agreement. In addition, it did not comply with the requirement of article XVIII that "whenever notice is given for changes, the nature of the changes desired must be specified in the notice." No such specification was contained in the Union's notice. However, Respondent waived the article XVIII requirement of notice and, accordingly, I find a waiver on the part of Respondent.[1]

B. *Respondent Ignores the Union's Request for Bargaining*

Soon after Respondent received the above letter from the Union, Robert F. Stuart, Jr., vice president of Respondent, contacted his attorney and told him that one of the employees in the bargaining unit, Percy Miller, was dissatisfied with how the health insurance benefits were being administered by the Union. Stuart testified that he heard these complaints from Miller on several occasions as early as a year prior to December 17, 1979. He did not contact his attorney on any of those previous occasions, but when Miller complained, Stuart told him that he would have to seek redress from the Union. Stuart stated that he contacted his attorney after receipt of the letter from the Union to find out why Respondent had to negotiate with the Union if an employee was unhappy with the way the health benefits were being administered. Stuart sent a copy of the letter from the Union to his attorney.

The Union received no reply from Respondent concerning its request to discuss modifications in the contract and, in the middle of January 1980, Thomas Mikolasko, business agent of the Union, attempted to contact Robert Stuart by telephone and was told by a person in Stuart's office that he was not in. Mikolasko called again the next week and left messages for Stuart to return his call. At no time were his calls returned. Stuart testified that he did not recall receiving any messages concerning Mikolasko's telephone calls to his office.

C. *Respondent Polls Its Employees*

On January 21, 1980, Respondent sent out identical letters to the two employees in the bargaining unit, Percy Miller and John Mooney. The letters read as follows:

> The Company has received notice from General Service Employees' Union, SEIU, Local 200, AFL-CIO, to renegotiate the present union contract which terminates January 31, 1980. We have a doubt as to whether you and other employees in the bargaining unit wish to have Local 200 as your bargaining representative. In order to determine whether the Union continues to represent a majority of employees in the unit, we are conducting a poll by secret ballot.
>
> Accompanying this letter is a plain ballot for you to mark and return in the envelope provided. Please do not put your name or any other identifying information on either the ballot or the return envelope.
>
> Your participation in the poll is entirely voluntarily. Also, we wish you to be assured that neither the results of the poll, nor your participation in it, will in any way affect your continuing relationship with the Company. To be perfectly clear, no matter the outcome there will be no reprisals of any kind.
>
> Should you have any questions regarding this letter, please call me.
>
> Very truly yours,
> Robert F. Stuart, Jr.
> W. D. Hassett, Inc.

The ballot which accompanied the letter read in relevant part as follows:

[1] It is noted that Respondent did not communicate its waiver action to the Union. Notwithstanding, I find Respondent effectively waived the notice and specification requirements of the agreement.

BALLOT

DO YOU WISH TO BE REPRESENTED FOR PURPOSES OF COLLECTIVE BARGAINING BY GENERAL SERVICES EMPLOYEES UNION, SEIU, LOCAL 200, AFL-CIO?

On January 29, 1980, Respondent informed the Union of its disbelief that the Union continued to represent a majority of the employees in the bargaining unit. That letter read as follows:

January 29, 1980

Mr. Walter J. Butler, President
General Service Employees' Union
SEIU, Local 200, AFL-CIO
3060 Erie Boulevard, East
P. O. Box 1200
Syracuse, New York 13201

Re: Hassett Maintenance Corporation

Dear Sir:

We represent Hassett Maintenance Corporation and are responding on behalf of our client to your request to renegotiate the labor agreement which expires on January 31, 1980.

Please be advised that Hassett Maintenance Corporation does not believe that the Union continues to represent a majority of employees in the bargaining unit.

Very truly yours,
James N. Schmit
Damon, Morey,
Sawyer & Moot

D. *Respondent Makes Unilateral Changes*

On the first payday in February 1980, Respondent discontinued deduction of union dues from the pay of the employees in the bargaining unit. On that payday Robert Stuart met with John Mooney at the Hassett Maintenance offices. Mooney testified that Stuart told him of the results of the poll and who voted for and against the Union. Stuart denied that he indicated which way each employee voted but admitted that he suspected as to who voted which way. Stuart admitted telling Mooney that dues would no longer be checked off; that, inasmuch as Respondent would not be contributing to the Union's health and pension plan, the employee should sign up with the Company's own health and hospitalization plan so that they would not miss coverage. On February 22, 1980, Respondent stopped contributing to the health insurance and pension plan provided for in the collective-bargaining agreement and instituted a Blue Cross/Blue Shield plan for the employees in the bargaining unit.

E. *Issues*

1. Having waived the untimeliness of the notice has Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act?

2. Was Respondent's poll of the employees in violation of Section 8(a)(1) of the Act?

3. Has Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral changes; i.e., stopping the checkoff of dues, terminating its payments to the Union's health benefit plan, and instituting its own health benefit plan?

F. *Discussion and Conclusions*

As previously indicated, Respondent ignored the Union's December 3 letter requesting that mutual agreeable dates be set up for discussing modifications of certain articles in the then existing agreement (due to expire January 31, 1980) until January 29, 1980, when it sent a letter to the Union responding to the Union's request to negotiate, advising the Union that Respondent did not believe that the Union continued to represent a majority of employees in the bargaining unit. In the meantime, Respondent was conducting a poll of employees by letters and secret ballots mailed to them on January 21, 1980.

Thus, Respondent refused the Union's request to meet to discuss modification of the contract, giving no response to the Union's letter until more than 8 weeks subsequent to the date the Union sent its letter and more than 6 weeks subsequent to the date that Respondent states it received the letter. In addition, Respondent ignored the Union's efforts to contact it by telephone. Business Agent Mikolasko was informed that Respondent was not in and, after leaving messages for Stuart to return his call, the Union heard nothing from Respondent. Standing alone, I find Respondent's conduct to be a refusal to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

With respect to Respondent's conduct of the poll of its employees, I find its action in the circumstances to be interrogation of its employees in violation of Section 8(a)(1) of the Act. In reaching that conclusion, I am persuaded that Respondent did not have a good-faith doubt of the Union's majority standing. I do not consider the mere expression of dissatisfaction by a unit employee with the way the Union was administering its health benefit provision (one of several services the Union provided as representative) as an indication that the employee no longer wanted the Union to represent him. Accordingly, a poll of the employees' desires during a period when Respondent was obligated to continue recognizing and bargaining with the Union is unlawful conduct on the part of Respondent. Respondent admitted that the complaints of this employee concerning the Union's administration of the health benefit program occurred as far back as 1978, and, yet, Respondent chose a time, long after it received the request to negotiate modifications of the contract, and just prior to its terminal date to act on the complaints.

Therefore, I agree with the General Counsel that, if the poll were truly conducted to serve a purpose other than a mechanism to cover up Respondent's refusal to bargain in good faith, the more reasonable course of action by Respondent would have been to file an RM

petition between the 60th and 90th day prior to the expiration of the contract. This, Respondent did not do.

In *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967), the Board issued its Supplemental Decision and Order in which it adopted the following criteria in determining the legality of the polling of employees by an employer:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

In *Struksnes*, the Board stated that the purpose of the polling in those circumstances is clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful. The requirement that the lawful purpose be communicated to the employees, along with assurances against reprisal, is designed to allay any fear of discrimination which might otherwise arise from the polling, and to avoid any tendency to interfere with employees' Section 7 rights. Secrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known. And the absence of employer unfair labor practices or other conduct creating a coercive atmosphere will serve as a further warranty to the employees that the poll does not have some unlawful object, contrary to the lawful purpose stated by the employer. The Board stated further that, in accord with the presumptive rules applied by the Board with court approval in other situations, this rule is designed to effectuate the purposes of the Act by maintaining a reasonable balance between the protection of the employee's rights and the legitimate interest of employers.

The letter sent by Respondent to its employees on January 21, 1980, disclosed in effect, that the purpose of the poll was to determine the truth of the Union's claim of majority. That purpose was communicated and the Employer indicated that the poll was entirely voluntary. The employees were assured that neither the results of the poll nor their participation in it would in any way affect their continuing relationship with the Company and that there would be no reprisals of any kind. The employees were polled by secret ballot. However, the Employer did not observe the fifth requirement of *Struksnes* quoted above; namely, that the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

From December 12, when the Employer received written notice of the Union's desire to negotiate changes in the contract, to January 29, 1980, after it had received the results of the poll, Respondent refused to acknowledge the Union's written request for negotiation of changes, and ignored the Union's telephone calls seeking negotiation. That conduct I found above to be a refusal to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, and, accordingly, an unfair labor practice which created a coercive atmosphere that tainted the poll.

Having found that the Employer committed violations of Section 8(a)(5) and (1) with respect to its refusal to bargain in good faith including its illegal conduct in taking the poll in violation of Section 8(a)(1), I find also that Respondent violated Section 8(a)(5) and (1) by its changes of the terms and conditions of employment without giving prior notice to the Union or affording it a chance to bargain over the changes (discontinuing compliance with the dues-checkoff provision of the agreement; discontinuing deduction of union dues on February 22, 1980; instituting a Blue Cross/Blue Shield plan on February 22; and discontinuing contributing to the health insurance and pension plan provided for in the agreement). I find further that Respondent by telling its employees: (1) that it was not going to have a contract with the Union, (2) that it was not going to make any more payments to the Union for health and life insurance, and (3) that they should sign into its health plan so that there would be no lapse in coverage interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

CONCLUSIONS OF LAW

1. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 200, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All building service employees employed by the Employer within the jurisdiction of this Local [the Union], but excluding professional employees, guards, and supervisors as defined by the Labor Management Relations Act, as amended.

4. At all times since February 1973, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive representative of the employees in the unit described above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act by polling its employees as to their union sympathies or desires; telling its employees that it was not going to have a contract with the Union; telling its employees that it was not going to make any more payments to the Union for health and life insurance; telling its employees that they should sign into its health plan so that there would be no lapse in coverage, in violation of Section 8(a)(1) of the Act.

6. Since December 3, 1979, Respondent has refused to bargain with the Union by ignoring the Union's request to bargain and by making the following changes in the terms and conditions of employment without giving prior notice to the Union or affording it a chance to bargain over the changes; discontinuing compliance with the dues-checkoff provision of the collective-bargaining agreement then in effect; discontinuing deduction of union dues on or about February 22, 1980; instituting a Blue Cross/Blue Shield plan on or about February 22, 1980; and discontinuing contributing to the health insurance and pension plan provided for in the collective-bargaining agreement, in violation of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act and in its refusal to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist from committing any further violations of the Act; to restore the *status quo ante* by payment of union dues and contributions to health and pension benefits that it discontinued since January 31, 1980, at no cost to the employees in the bargaining unit; to discontinue the Blue Cross/Blue Shield plan for the benefit of the employees in the unit; and to cease telling its employees that it is not going to have a contract with the Union or make any more payments to the Union for health and life insurance.

I shall further recommend that Respondent, upon request, be ordered to bargain with the Union as the exclusive bargaining agent of its employees and to post the usual appropriate notices.

[Recommended Order omitted from publication.]